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Supreme Court of the United States

October Term, 1958

No. 935

JOSEPH RICCOBONO,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. REGAN, JR., GOODMAN A. SARACHAN, COMMISSIONERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

A. The Opinions Below

No opinion was written at Special Term of the Supreme Court of the State of New York. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported in 7 A. D. 2d 48, 180 N. Y. S. 2d 496. Said opinion is appended hereto. The Court of Appeals of the State of New York rendered no opinion, but stated:

"Orders affirmed (Knapp v. Schweitzer, 357 U. S. 371, 380-381). No opinion, all concur."

The foregoing is not yet reported officially or unofficially, but appears in the New York Law Journal, March 17, 1959, at page 10.

By order dated April 9, 1959, the Court of Appeals granted a motion by petitioner to amend its remittitur as follows:

"A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant Riccobono and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and it hereby is granted.

Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

'Upon the appeal herein on behalf of the appellant there were presented and necessarily passed upon the following questions, viz:

'1 Whether the procedure whereby the appellant was committed violated the due process clause of the Fourteenth Amendment to the United States Constitution;

'2. Whether the privileges and rights of the appellant not to be compelled to incriminate himself under the Fifth Amendment to the United States Constitution were improperly infringed; and

'3. Whether the over-all effects of the proceedings violated the due process clause of the Fourteenth Amendment to the United States Constitution

and the Fifth and Eighth Amendments to the United States Constitution.

"This Court held that the rights and privileges of this appellant under the United States Constitution were not infringed or violated."

This decision has not yet been reported, officially or unofficially, but appears in the New York Journal of April 13, 1959, at page 12.

B. Grounds on Which Jurisdiction of This Court Is Invoked

1. The order of the Court of Appeals of the State of New York sought to be reviewed was made and entered on March 13, 1959.

2. There was no order respecting a rehearing or granting an extension of time to file this petition.

3. The statutory provision believed to confer jurisdiction on this Court to review the order in question by writ of certiorari is 28 U. S. C. Section 1257 (3).

C. Questions Presented

1. Were the privileges and rights of the petitioner not to be compelled to incriminate himself, under the Fifth Amendment to the United States Constitution, improperly infringed by requiring him to answer questions which might incriminate him for Federal crimes, without any grant of immunity as to such crimes, where he was currently the subject of Federal investigations, where a Federal investigator was present at his questioning before the State Commission of Investigation, and where such State Commission was charged by statute with the duty of investigat-

ing crimes against the Federal government and reporting evidence thereof to the proper prosecuting authorities?

2. Was the petitioner denied due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution by reason of the fact that he did not receive reasonable opportunity to oppose, at Special Term of the Supreme Court of New York State, the application to commit him until he should answer interrogatories put by the State Commission of Investigation?

3. Did the overall effects of the proceedings in the New York State Supreme Court violate the due process clause of the Fourteenth Amendment to the United States Constitution, and the Fifth and Eighth Amendments to the United States Constitution, in that the petitioner has been ordered incarcerated until he answers, "truthfully and responsively", questions which may incriminate him under Federal law, without being accorded immunity in the Federal jurisdiction?

D. Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are:

1. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution;

2. Section 406, New York Civil Practice Act;

3. New York Laws of 1958, Chapter 989, Section 2, Subdivisions 1, 5 and 7, and Section 7;

4. New York Penal Law, Section 2447, Subdivisions 1 and 2.

All of the foregoing are set forth in the Appendix to this petition.

E. Statement of Facts

The Commission of Investigation, the respondent herein, is a body created by Chapter 989, of the Laws of New York, 1958 (McKinney's New York Unconsolidated Laws, Sections 7051-7057).

The Commission is empowered to investigate, among other things, "Any matter concerning the public peace, public safety and public justice" (id., §2, Subdivision 1). The Commission is specifically directed by statute to "cooperate with departments and officers of the United States government in the investigations of violations of the Federal Laws within this state" (id., § 2, Subdivision 5).

It is further enacted that "Whenever it shall appear to the commission that there is cause for the prosecution for a crime, . . . the commission shall refer the evidence of such crime . . . . to the officials authorized to conduct the prosecution . . ." (id., §2, Subdivision 7).

Finally, Section 7 of Chapter 989 provides that immunity from prosecution [by New York State only, of course] shall be accorded to any witness who claims his privilege, but who is nevertheless required to answer.

Acting pursuant to the powers granted to it by Chapter 989 of the Laws of 1958, the Commission instituted an investigation of a now-famous gathering which took place at Apalachin, New York, on November 14, 1957. It alleged that many of the persons there present had criminal records (72-3, 386-7)*.

The Chairman stated that the Commission intended "to find out whether the crimes of conspiracy, violation of Sec-

* References in parentheses, unless otherwise indicated are to folios of the printed record on appeal in the State Court.

tion 340 of the General Business Law, which pertains to monopoly and restraint of trade, bribery of public officials or any other crimes were committed or planned at this meeting" (485).

On August 11, 1958 the petitioner was served with a subpoena by the Commission commanding him to appear on August 12, 1958. On August 13, 1958 he was placed under oath and was asked a series of questions concerning his alleged presence at the home of Joseph Barbara in Apalachin, New York and what transpired there (389-412). He refused to answer these questions on the grounds that he thereby might incriminate himself (id.).

Petitioner informed the Commission that he had been advised by counsel that the Commission was under the statutory duty and function to cooperate with the departments and officers of the United States government in the investigation of violations of the federal laws within the State of New York (392-393), and it appeared that Federal Law enforcement agents were present in the hearing room among the spectators (437-442).

The Commissioners, undoubtedly recognizing that the witness genuinely feared that his answers would tend to incriminate him, attempted to confer immunity upon him pursuant to its claimed authority to do so under § 7 of Chapter 989 of the Laws of 1958 (415-420).

Thereafter the same questions which were previously propounded to petitioner were again directed to him and he again declined to answer on the grounds of his constitutional privilege against self-incrimination, pointing out various matters which are dealt with in Section F, *infra* (433-435).

Interrogation of the petitioner was concluded about 11:45 a.m., and he was directed to return that day at 1:00 p.m. (474-476). At that time petitioner was served with an order to show cause* returnable at 2:30 p.m. on that day (58-62). Accompanying the order was the moving affidavit (64-93) which did not set forth the questions which petitioner refused to answer but generally alleged that he refused to answer "many pertinent questions put to him" (78-79) and that he "refused to answer the material and relevant questions put to him at the hearing" (82-83). No transcript of the testimony was annexed to the affidavit, but the affidavit stated that copies of such transcript would be submitted to the Court and delivered to the witness (id.).

At 2:30 p.m. petitioner together with counsel appeared at the hearing at Special Term. At that time they were given a transcript of the prior testimony, and a memorandum of law prepared by counsel for the Commission (809-810). An application for a reasonable adjournment to afford counsel an opportunity for the presentation of evidence and submission of a memorandum of law was denied (798-807, 812-822).

The transcript was received in evidence (809-810) and Counsel then moved to vacate the order on the ground that the supporting affidavit was inadequate and insufficient as a matter of law. The motion was denied (809-812).

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* The order to show cause and moving affidavit applicable to this petitioner is not printed in the record, but is similar to one which appears therein; by stipulation, this order to show cause was treated as the prototype in all of the companion cases, of which this petitioner's was one (37-42).

Counsel then had no alternative but to present oral argument. Immediately upon the conclusion of the oral argument the Justice at Special Term, relying solely on the general affidavit of the Chairman of the Commission with no opportunity on the part of appellant to present rebutting evidence or legal authority, found that the petitioner had "without reasonable cause" refused to answer legal and pertinent questions which were set forth in the transcript and directed forthwith that the petitioner be committed to jail until he answers the questions that had been propounded to him (822-825, 830-831).

Pursuant to the order at Special Term, petitioner has been imprisoned, without bail, in the New York County Civil Jail since August 13, 1958.

F. Timely Raising of Federal Questions

Petitioner raised the Federal Constitutional questions relied upon here from the very outset of the proceedings. At the commencement of his interrogation the witness declined to answer the questions put to him on the ground that his constitutional rights were being infringed and informed the Commission that he was at that very time the subject of several Federal investigations (391-412). The Commission then, on recommendation of the Chief Counsel of the Commission, accorded to petitioner a grant of immunity limited to protection from prosecution by New York State (412-420). The witness then reasserted his rights under the United States Constitution and declined again to answer the Commission's questions (432-473). Counsel for petitioner then asked the Commission to concede that present at the hearing were representatives of both State and

Federal investigative agencies. These assertions were not denied by the Commission (437-443).

At the hearing at Special Term petitioner again, through counsel, informed the Court of his claim of rights under Amendments 1, 4, 5 and 14 of the Constitution of the United States (818-821).

Petitioner raised the question of the undue haste with which the proceedings were conducted, and the consequent lack of opportunity to defend in violation of petitioner's rights under the due process clause of the Fourteenth Amendment, specifically before the Court of Appeals and the Appellate Division (7 App. Div. 2d 48, 5, 7), and amendment to remittitur by the Court of Appeals, *supra*. In addition, at Special Term counsel for petitioner applied for a reasonable opportunity to present evidence and submit a memorandum of law. This was denied (798-807).

G. The Petitioner's Contentions

I. Petitioner's rights under the Fifth Amendment were infringed.

II. The procedure violated due process of law.

III. The overall effects of the proceedings violated due process and constitute cruel and unusual punishment.

The law and argument in support of Points "I", "II" and "III" are found in the brief of the petitioner, Miranda, pages 9 through 21, in the companion case which is to be heard herewith. The Court is respectfully referred to petitioner's said brief.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JOSEPH E. BRILL
NICHOLAS P. IANNUZZI

APPENDIX

Opinion in Appellate Division

Reported in
7 A. D. 2d 48; 180 N. Y. S. 2d 496.

BASTOW, J. We consider together appeals by seven respondents in separate proceedings seeking a review of orders made at Special Term. Procedural differences in disposing of the applications at Special Term require the preliminary statement that five respondents (Frank Valenti, Mancuso, Riccobono, Castellano and Miranda) appeal from orders made by SPECTOR, J., and two respondents (Lombardozzi and Peter Valenti) appeal from orders by TIETZER, J.

In August, 1958 the appellants were served with subpoenas issued by the Commission of Investigation of the State of New York commanding them to appear at a public hearing being conducted by the Commission in New York City. At the first hearing on August 12, 1958 the chairman announced that the hearing was being held in connnection with what is now known as the Apalachin meeting in November, 1957, at the residence of one Joseph Barbara in Tioga County. The purposes of the hearing were stated to be, among other things, "Whether the crimes of conspiracy, violation of Section 340 of the General Business Law which pertains to monopoly or restraint of trade statutes, and bribery of public officials or any other crimes were committed or planned at this meeting." There followed individual hearings for each of the appellants commencing on August 12 and ending on August 19. Each was represented

by one or more counsel at the hearings and in the subsequent court proceedings.

The pattern of the proceedings when each appellant appeared before the Commission was much the same. Each was asked a series of questions numbering between 30 and 40. Responsive answers to these questions would have been relevant to one of the subjects of the investigation as stated in each subpoena to be "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin meeting. Other than identifying themselves, appellants refused to answer all questions. Such refusals were based on the privilege against self incrimination and other grounds, most of which are presented upon this appeal and will be hereinafter considered.

Following the respective refusals to answer questions, the members of the commission purporting to act under statutory authority (L. 1958, ch. 989, §7) voted to and did purport to confer immunity upon each appellant in accordance with section 2447 of the Penal Law. Each witness was then informed that he had immunity "from prosecution by the New York State authorities on account of any transaction, matter or thing of a criminal nature which may be revealed by your truthful and responsive answers to the particular questions which this Commission * * * may now direct you to answer." Thereafter, each appellant was asked some 26 questions which were among those previously propounded. Again each witness refused to answer the questions upon stated grounds. The direction was made that the questions be answered but each appellant persisted in his refusal.

We consider first the ensuing court proceedings relating to the five appellants who appeared before the commission on August 12, 13 and 15. As to each, individual orders were obtained directing the named witness to show cause, either forthwith or upon the same day that he had testified, why a warrant should not issue for his apprehension and commitment forthwith to jail there to remain until he answered the questions. The show cause order was supported by an affidavit of the commission chairman and a copy of the subpoena. Following a hearing in each case, and to which we shall advert subsequently, the applications were granted and warrants issued for the imprisonment of the five appellants until each answered the questions set forth in the warrant.

The other two appellants were brought before Special Term the day after the commission's hearing. In the interim, transcripts of the commission's hearing were forwarded to the court and counsel. Upon request of these appellants an adjournment of two days was granted. At that time appellants produced certain witnesses and while they complain of erroneous rulings in the course of the examination of these witnesses, it does not appear from either record or briefs that they attack the validity of the court hearings upon the ground that there was a summary determination without an adequate hearing. At the conclusion of this combined hearing the applications were granted and similar warrants issued for the imprisonment of the witnesses.

It is against this background that we consider the various contentions of the appellants. It is claimed that the act (L.

1958, ch. 989) creating the respondent commission is unconstitutional and in violation of the State constitutional provision (art. V, § 3). To place in focus this contention it is necessary to point out that section 2 of article V of the Constitution provides for 19 civil departments in the State Government. Section 3 then provides in part that "No new departments shall be created hereafter, but this shall not prevent the legislature from creating temporary commissions for special purposes".

Turning to the enactment (L. 1958, ch. 989) under attack we find in section 1 the provision that "There is hereby created a temporary state commission of investigation." The four commissioners are to be appointed for a term of five years (§ 2) and the act is to remain in effect for five years (§ 13). Judged by any standards the commission is a temporary one and so at least one appellant concedes in his brief. It is unnecessary to recite in detail the functions, powers and duties set forth in the 11 subdivisions of section 2 of the act. We construe them as being "special purposes" within the meaning of the language set forth in the exception to the constitutional prohibition against the creating of new State civil departments.

One of the landmark decisions construing this constitutional provision is *Matter of People* (*Westchester Tit. & Trust Co.*) (268 N. Y. 432). There it was held that an act creating a Mortgage Commission and transferring to it the powers vested in the Superintendent of Insurance to control and administer mortgage investments of guarantee companies came within the plain intendment of the constitutional provision. The court placed emphasis upon the

abnormal if not emergency conditions that existed. The court stated (p. 443) that such conditions "call for prompt action and, in the opinion of the Legislature, no department is now equipped for such action. The Commission is created for the special purpose of prompt and effective action during the period when there is special need for prompt and effective action by a public agency properly equipped for that purpose."

In *Matter of Di Brizzi* (*Proskauer*) (303 N. Y. 206) the court passed upon the right of the Governor and Attorney-General to create by joint action a State Crime Commission under the provisions of subdivision 8 of section 63 of the Executive Law. In upholding the validity of the action it was said (p. 216) that "This is a *general* investigation into *organized* crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." The statute under consideration authorizes similar general investigations for the guidance of both the Executive and the Legislature. Pursuant to its legislative power (N. Y. Const., art. III, § 1) the Legislature was vested with power to enact the statute and we conclude that it was not violative of section 3 of article V.

The appellants make various attacks upon the immunity conferred upon them by the commission. Section 7 of the enactment (L. 1958, ch. 989) provides in substance that in any investigation or hearing conducted by the commission,

relating to any crime with respect to which, by express statutory provision, a competent authority is authorized to confer immunity, such may be conferred by the commission in accordance with the provisions of section 2447 of the Penal Law, "but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity." Without attempting to consider seriatim the contentions of the several appellants, we state our views that lead to the conclusion that immunity was properly conferred upon each appellant.

The commission, as has been noted, placed upon the record that it was investigating, among other things, whether the crimes of conspiracy or bribery of public officials had been committed. (Penal Law, §§ 378, 580.) By express statutory authority (Penal Law, §§ 381, 584) certain named officials and bodies are authorized to confer immunity in accordance with section 2447 of the Penal Law. The act under consideration extended this authority to the commission. At the hearings each appellant was carefully informed of such grant and the extent of the immunity flowing therefrom. This is found in subdivision 2 of section 2447 where it is stated that "immunity", as used therein, "means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding." The immunity so conferred was not limited to the crimes the commission had stated it was investigating.

It was complete immunity whether the answers given might involve the witness in the crimes of bribery or conspiracy or any other crime provided, of course, that the answers were truthful and responsive to the questions. Thus, appellants received immunity coextensive wtih their privilege against self incrimination. (N. Y. Const., art. I, § 6.)

Appellants further contend the proffered immunity was worthless since the facts were not disclosed regarding communications between commission, the Attorney-General of the State, and various District Attorneys. As indicated above, section 7 of the act creating the respondent (L. 1958, ch. 989) provides that its right to confer immunity is to be exercised only after affording the Attorney-General and the appropriate District Attorney the opportunity to be heard in respect of any objections which they may have to such grant of immunity. In passing it might be noted that a similar provision is found in section 2447 (subd. 3, par. [d]) of the Penal Law. This section was enacted as a result of recommendations filed by the New York State Crime Commission in 1953. (See Third Report of N. Y. State Crime Comm.; N. Y. Legis. Doc., 1953, No. 68, pp. 14-16.) After recommending therein that the power to grant immunity be given to a "competent authority" which was defined, among other things, as "a majority of a legislative • • • commission", it was said (p. 16): "The legislation might also provide that any official or official group, other than a court, authorized to grant immunity, before so doing should as a matter of course consult with the appropriate district attorney."

When requested in these proceedings, the commission informed each appellant that it had afforded the Attorney-General and the appropriate District Attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to [illegible]ce the commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the commission if it fails to comply with the requirements of the statute.

Lastly, upon this subject, the appellants claim that the immunity so conferred was invalid since it does not pro-

tect them from subsequent prosecutions by Federal authorities. This question has been recently passed upon by this court in *People* v. *Costello* (6 A D 2d 385) in the light of *Knapp* v. *Schweitzer* (357 U. S. 371). In the *Costello* case (p. 387) we said that "Although the potential exposure to Federal prosecution asserted by appellant seems reasonable enough, since the Federal Government might form an interest in the answers which he could give concerning the written notations on the paper found in his pocket, this exposure is not a ground for excusing the answers where the immunity which flows from State law is as adequate as the State can make it against its own subsequent prosecution. (*Dunham* v. *Ottinger*, 243 N. Y. 423.) This rule is not, of course, open to re-examination here. (Cf. dissenting opinions by BLACK and DOUGLAS, JJ., in *Knapp* v. *Schweitzer, supra*, p. 383.)."

The appellants, however, renew their claim as to the inadequacy of the conferred immunity upon the ground that one of the functions of the commission is to "co-operate with departments and officers of the United States government in the investigation of violations of the federal laws within this state." (L. 1958, ch. 989, § 2, par. 5.) This does not alter our opinion as expressed in the *Costello* case (*supra*). As we understand the *Knapp* case (*supra*) the crucial holding was that the sole "purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." (357 U. S. 371, 380.)

It has been heretofore found that the State conferred upon appellants complete immunity. It is unnecessary for this court to speculate as to what the effect of this might be in the event of subsequent Federal prosecution under circumstances here open only to conjecture. The test is whether the immunity gives protection against State prosecution—"all that the State is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution." (*Dunham* v. *Ottinger*, 243 N. Y. 423, 438.)

In sum, every person owes a duty to the State to testify when called before a duly constituted authority. However, he may not be compelled to testify when he claims his privilege against self incrimination. But that privilege disappears when the State removes any danger of criminal prosecution—based on any testimony he may give—by granting immunity securing the witness against such prosecution. Hence, when immunity is properly tendered to a witness claiming his constitutional privilege, he must answer or suffer the consequences of his contumacy. The object of the constitutional privilege is fully accomplished when immunity is granted.

We recognize that in *Knapp* v. *Schweitzer* (*supra*) the court posed but left unanswered the question as to whether, in the case of collaboration between State and Federal officials, a defendant might successfully assert his privilege in the State proceeding. Moreover, it is suggested therein that evidence so obtained might be excluded in a Federal prosecution. This suggestion is re-enforced by

the views expressed by some of the Justices in separate opinions that the rule enunciated in *Feldman* v. *United States* (322 U. S. 487) should be reconsidered. All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham* v. *Ottinger* (243 N. Y. 423, 438, *supra*). There, as heretofore stated, it was held that the State is only required to give immunity against its own processes and when that is done the constitutional requirements have been satisfied.

Finally, the appellants contend that the commission pursued the wrong remedy in bringing these proceedings pursuant to section 406 of the Civil Practice Act. Moreover, they claim that if the section is applicable the proceedings at Special Term were conducted in such a manner as to be violative of the due process clauses of the State and Federal Constitutions. The appellants argue that the witnesses, if they are in contempt, may only be prosecuted in a criminal proceeding concerning such contempt (Judiciary Law, § 750). Section 406 provides, in substance, that when a witness, such as these appellants, attending before a body, such as respondent, "refuses without reasonable cause * * * to answer a legal and pertinent question * * * the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to

law." The distinction between this section and the provisions of the Judiciary Law (art. 19) is that the latter are punitive in nature whereas section 406 is coercive alone. (Cf. *Matter of Delehanty* [*Sullivan*], 202 Misc. 33, affd. 280 App. Div. 542, affd. 304 N. Y. 725.)

In *Matter of Barnes* (204 N. Y. 108) the court considered a like provision than found in section 856 of the Code of Civil Procedure. Judge GRAY wrote (p. 113) that "This statute is, and always has been, a valuable instrumentality in the administration of justice and the enforcement of laws." We find no authority that required the commission to proceed to invoke the punitive provisions of a criminal contempt as distinguished from its applications for coercive relief to compel the witnesses to testify.

A more troublesome question is presented as to whether appellants were accorded due process in connection with the court proceedings on August 12, 13 and 15. In *Matter of Barnes* (*supra*) one of the questions before the court was whether a summary conviction under the predecessor section violated a constitutional right. Some of the members of the court were of the opinion (1) that a summary conviction without notice violated no constitutional right and (2) that even if notice were necessary, the court could read into the section a provision requiring notice to be given. A majority of the court, however, while disagreeing with the first proposition held (p. 122) that the language of the section "may be so construed as to require notice to one charged with the contempt, and that when read in connection with the provisions of the Judiciary Law relating to criminal contempts, the question is removed from the realm of doubt."

In these proceedings there can be no question that notice was given in the form of show cause orders based upon an affidavit made by the chairman of the commission setting forth in some detail service of the subpoena and the ensuing proceedings before the commission. A transcript of the testimony in each proceeding was made available to the court and counsel for the witness. The disturbing feature of the proceeding is what took place in Special Term in connection with five of these appellants. As has been stated heretofore, these witnesses were brought before Special Term on the same day each had been called to testify. All requests for adjournments were denied. There was, however, a hearing and counsel for each appellant advanced in various ways many of the same contentions that are presented to this court and discussed herein. A careful reading of the record of the five proceedings discloses that, in substance, each counsel requested additional time to submit a brief or examine the law. Counsel was of the opinion that there were many intricate questions of law that should be explored. The court was of the opinion that the legal questions were simple and should be passed upon at once. We do not find any request for an adjournment to enable appellants to produce evidence either documentary or by witness. The precipitate haste with which the proceedings were conducted does not meet with our approval. However, the ultimate question is whether there was any prejudice to appellants amounting to a denial of due process because they were denied adjournments so their counsel could examine the law and submit briefs. After the passing of weeks we have examined the same questions, together with others advanced by appellants,

and determine that Special Term was correct in its legal decisions and in the action taken.

The contentions of the remaining two appellants that they were not accorded due process are without substance. As to them, adjournments were granted when counsel stated that they desired to submit proof. Subsequently, witnesses were called in an attempt to prove co-operation between State and Federal law enforcement agencies as bearing upon the completeness of the granted immunity. What has heretofore been written upon this subject makes it clear that such testimony was irrelevant and properly excluded. The same conclusion is reached as to the court's ruling excluding testimony relating to the notice given by the commission to other State prosecutors before conferring immunity.

It has been said that "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. * * * Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (*Dohany* v. *Rogers*, 281 U. S. 362, 369.) When the contentions of appellants are considered in the light of this legal principle it cannot be found that there was any denial of due process. They received reasonable notice. Some had been subpoenaed two weeks before the date of their appearance. Each was represented by counsel and after complete immunity had been granted each persisted in his refusal to testify.

Thereupon they were brought before Special Term in proceedings instituted pursuant to section 406 of the Civil Practice Act. The burden then placed upon appellants to justify their refusal to answer the questions was the establishment by them of a sufficient cause for which a reason could be and was given. The reasons so advanced consisted of legal contentions that the creation of the commission was unconstitutional and that the immunity conferred was either defectively accomplished or not adequate to protect them from subsequent prosecution. After hearings Special Term found that no reasonable cause had been shown by appellants for their refusals to answer the questions. The decisions were properly made pursuant to section 406 after hearings that met the requirements of due process.

The orders appealed from should be affirmed.

BREITEL, J. P., RABIN, M. M. FRANK and VALENTE, JJ., concur.

Orders unanimously affirmed.

Constitutional Provisions

A. Amendment 5, United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

B. Amendment 8, United States Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. Amendment 14, United States Constitution.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." * * *

Statutory Provisions

New York Civil Practice Act

"§ 406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for a service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a sub-

poena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action."

New York Laws of 1958, Chapter 989

"Section 2. Functions, powers and duties of the commission. The commission shall have the following functions, powers and duties:

1. The commission shall have the duty and power to conduct investigations in connection with:

(a) The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

(c) Any matter concerning the public peace, public safety and public justice.

• • •

5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

• • •

7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer."

New York Penal Law

"SECTION 2447. WITNESSES' IMMUNITY.

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity; if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order of competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheles be prosecuted or subject to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer or in producing or in failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt." * * *

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1958

No. 935

JOSEPH RICCOBONO,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

A petition is here sought for a writ of certiorari to the New York Court of Appeals to review an order of that Court, entered March 13, 1959; which unanimously affirmed without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on December 9, 1958 (955).* That Court in turn had unanimously affirmed, with an opin-

*Numerals in parentheses refer to folio numbers in the consolidated record on appeal.

ion by Bastow, J. (98, *et seq.*; and see Petition, Appendix, page 11), an order of the Supreme Court of New York County, entered August 13, 1958 (52g). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing petitioner to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting," which had been held in New York at Apalachin, Tioga County. On April 9, 1959, the Court of Appeals amended its remittitur upon petitioner's application so as to define the precise questions considered (Petition, page 2).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August 1958. In the New York courts the appeals of all seven were consolidated. Petitioner and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date Michele Miranda, one of the other six persons so incarcerated, separately has petitioned this Court for a writ of certiorari to the New York Court of Appeals for review of the affirmance of his order and warrant of commitment; his petition was docketed on May 5. Another recalcitrant witness, Rosario Mancuso, separately has instituted an appeal to this Court from the decision of the New York Court of Appeals. A fourth, Paul Castellano, separately has filed both a notice of appeal and a petition for a writ of certiorari for review of the New York Court of Appeals decision affirming his incarceration. Both were docketed on May 22. An

application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission:

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York. Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.
>
> "This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar

Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

"Section 2(1)(a) The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*

"(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

"(c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in the Appendix to the Petition at page 26, *et seq.*

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who reside in various sections of this country and abroad. Petitioner and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by which petitioner and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara*

on or about November 14, 1957, at Apalachin, Tioga County, State of New York." (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including petitioner (191, 282, 382, 478, 588). The statement read, in part, as follows:

> "*In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes, were committed or planned at this meeting.
>
> "Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (386).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Petitioner's Conduct Before the Commission.

An individual hearing was held for petitioner before the Commission. A similar pattern of events occurred regarding petitioner and the other witnesses during their respective Commission hearings.

Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g., 360; 797).

Questions were directed to petitioner by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (389-412). Other than merely identifying himself (389-390), petitioner refused to answer these questions (390-412). His refusals were based on his privilege against self-incrimination and numerous other alleged general and technical grounds (391-393).

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon petitioner and the others (412-416). The Commission's action and the effect of its decision regarding immunity were clearly explained to petitioner, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (417-420).

After this instruction the same questions were repeated by the Commission (432, *et seq.*). As did the others, petitioner again refused to make any answer (432, *et seq.*) on the basis of several alleged grounds, including the privilege against self-incrimination contained in both the New York and United States Constitutions (433-435).

On behalf of the Commission the Chairman then specifically directed and ordered petitioner to answer the questions as they were put to him (436, *et seq.*). Petitioner nevertheless persisted in his refusal to answer (443, *et seq.*).

After petitioner had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (473-476).

The Hearings in the Trial Court.

After petitioner's separate hearing was adjourned by the Commission, pending further proceedings, an order was obtained and served personally on petitioner directing him to appear before the New York Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Petitioner was the third recalcitrant to appear before Mr. Justice Spector, then sitting in the motion part of the trial court, to explain his refusal to tes-

tify; two other witnesses were heard and committed on August 12. Petitioner was heard and committed on August 13.

The trial court offered petitioner full opportunity to explain why he had refused to testify. Petitioner's counsel took complete advantage of this opportunity and made extensive argument and factual representations (793-846). Furthermore, each of the two witnesses who preceded petitioner had raised the same legal objections that petitioner raised, and now raises, and the same judge who committed petitioner had heard and passed upon these similar arguments (682, 750, 751-792).

Before petitioner's judicial hearing, the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. The Court stated its findings were based on a study of the transcript (822-825), which was very short and easily understood. After full argument as described above, the Commission's application was granted by the Court (830-831); and the warrants executed.

* * * *

Since his commitment, petitioner has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court, or to the present, has petitioner given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him, petitioner

may secure his release pursuant to law (e.g., 52g [order], and 115 [warrant]).

Questions Presented

1. Does the duty of a state law enforcement agency to apprise federal law enforcement authorities of such violations of federal law as it discovers in the course of its investigations thereby convert the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, a prohibition against action by the national government only, into a prohibition against action by the state government after immunity has been conferred by the state upon petitioner?

2. Was the state trial court's refusal to grant petitioner's request for a hearing adjournment such an abuse of its discretion as to deprive petitioner of the due process protections guaranteed by the Fourteenth Amendment to the United States Constitution, where petitioner was offered full opportunity to present argument, and the state courts have unanimously upheld the manner by which the trial court acted in accordance with the state civil procedure?

* * * *

Petitioner here raises an alleged third issue that "the over-all effects of the proceedings violate due process and constitute cruel and unusual punishment" (Petition, page 19). The Commission is uncertain as to the legal theory so advanced, or the seriousness with which it is urged, for among other reasons no

witness before the Commission since its inception—including petitioner—has complained of the procedure by which the Commission conducted its hearings. Accordingly, no response is made to this specious "question". At best it is no more than a combination of arguments already offered respecting petitioner's federal privilege against self-incrimination and his rejected request for an adjournment, plus some window dressing. In any event petitioner has failed to indicate how this issue was timely raised in the state courts, particularly since it was in no way raised in the trial court or on the first appeal in the New York courts.

Argument

Petitioner has chosen to adopt *in toto* the legal argument presented to this Court in the Petition for a Writ of Certiorari filed by Michele Miranda (October Term, 1958, No. 893). In the interest of brevity, therefore, the Commission will incorporate by reference its response to the argument of Michele Miranda contained in the Commission's Brief in Opposition to Miranda's Petition.

This Court's decision in *Mills* v. *Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959), and the slight factual differences between the cases of Miranda and petitioner, require only a brief supplement to the Commission's response in that case.

POINT I

Petitioner's rights under the Fifth Amendment to the United States Constitution were not infringed and cannot be prejudiced by this state proceeding.

The Commission's argument on this point is set forth at pages 11 to 15 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (October Term, 1958, No. 893).

This Court's decision in *Mills v. Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959), must end any lingering speculation by petitioner that either federal-state cooperation, assuming it exists, or imminence of federal prosecution will make the federal privilege against self-incrimination applicable to state proceedings.

The facts in *Mills* were stipulated. The cooperation there admitted was significant and an accomplished fact. It did not consist of merely a statutory duty or authority to cooperate, which is the most petitioner may demonstrate here.

Furthermore, the danger of federal prosecution in *Mills* was imminent. Indictments against persons implicated had already been returned. A grand scale federal investigation by the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service, was in full swing. And as Mr. Chief Justice Warren noted in his dissenting opinion: "Doubt which might have existed concerning federal

interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years" (27 U. S. L. W. at 4421).

This Court held neither of these factors converted the Fifth Amendment into a prohibition against the states or state action in enforcement of its fundamental police powers.

POINT II

Petitioner was accorded full due process protection during this proceeding.

The Commission's argument on this point is set forth at pages 16 to 19 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (No. 893).

There are minor factual differences between the trial court hearings of petitioner and Miranda. These differences, however, do not affect the legal position of either. They have not been denied adequate due process protection, and their claims concern minutiae of state civil procedure which have been decided unanimously against them by the appropriate forum—the state's highest courts. Miranda is precluded from successfully establishing a due process claim because of his deliberate waiver of his right to contest on the merits by virtue of his special appearance. Petitioner, on the other hand, chose to avail himself of his opportunity for a hearing. He made extensive legal argument and offered factual representations; that they

did not persuade and are unsubstantial is not a deprivation of due process.

Petitioner's argument before the trial court makes it perfectly clear that the main purpose, if not the only purpose, of his requested adjournment was to await review by an appellate court of the commitments of prior recalcitrant witnesses. As was pointed out in the Commission's response to Miranda, even if the purpose of the adjournment was to secure more time to contest on the merits, the trial Court's decision here in denying such a request in the exercise of its discretion would not amount to a deprivation of a fair hearing. *A fortiori*, refusal to grant an adjournment to wait appellate review in related cases cannot have denied petitioner his fair hearing or under any analysis rise to the dignity of such a deprivation of due process as to call for action by this Court. At best all that could happen is that the matter would be sent back to the trial court and inquiry made there as to whether petitioner refused to answer the questions put to him—an admitted fact.

Moreover there can be no serious claim of deprivation of rights on the ground of surprise for two additional reasons. At the hearings petitioner was represented by counsel, and came fortified with prepared legal statements drawn in advance of the hearings, as did Miranda. Similarly, petitioner's attorney attended all prior proceedings resulting in the commitment of two other recalcitrant witnesses, thereby apprising himself of the legal consequences which might, and did in fact, result from his client's refusal to testify. Petitioner consciously and stoically made his choice: he was bound to defy this lawful inquiry and the

Court even if it meant his imprisonment. No amount of rhetoric can avoid that obvious truth.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

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